



REPUBLIC OF KENYA



Paddy Distributors Limited & another v National Cement Co Ltd & 2 others (Civil Suit 26 of 2018) [2024] KEHC 1535 (KLR) (Commercial and Tax) (16 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1535 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 26 OF 2018
FG MUGAMBI, J
FEBRUARY 16, 2024**

BETWEEN

PADDY DISTRIBUTORS LIMITED 1ST PLAINTIFF

NAKURU CEMENT SUPPLIERS LTD 2ND PLAINTIFF

AND

NATIONAL CEMENT CO LTD 1ST DEFENDANT

EQUITY BANK LIMITED 2ND DEFENDANT

DIAMOND TRUST BANK LIMITED 3RD DEFENDANT

RULING

1. For determination is the plaintiffs' Notice of Motion application dated 29th March 2023 brought under Order 42 rule 6 and Order 51 rule 1 of the *Civil Procedure Rules*. The applicants seek a stay of execution order, pending the hearing and determination of the intended appeal, alongside leave to file the appeal out of time.
2. The application is based on the plaintiffs' dissatisfaction with the court's ruling delivered on 24th November 2022, striking out their suit with costs and instead entering judgment in favour of the defendants' in the sum of Ksh.121,780,651.06 as prayed for in the counterclaim.
3. The plaintiffs acknowledge that the time for filing their appeal has lapsed, attributing the delay in filing it to their director's illness. Furthermore, the plaintiffs assert that the 1st defendant was already in the process of executing against the property owned by a director of the plaintiffs, thereby necessitating this application so as to preserve the substratum of their appeal.



4. The application is opposed by the 1st defendant through grounds of opposition dated 17th April 2023 and a replying affidavit sworn on 25th May 2023 by its Managing Director. The 1st defendant characterizes the application as an unwarranted retrospective attempt designed to postpone the execution process. The 1st defendant contends that the plaintiffs have not provided any plausible reason or evidence for the delay in filing the application. This, they say, is bound to cause them undue prejudice.
5. The 1st defendant points out that the plaintiffs have failed to offer any form of security proposal, as mandated by Order 42, rule 6(2)(b) of the *Civil Procedure Rules*. Furthermore, the defendant refutes that the plaintiffs have an appeal with prima facie chances of success.

Analysis

6. The parties canvassed their respective positions through written submissions which the Court has duly considered in addition to the pleadings, evidence and cases cited. The first issue for determination is whether the court ought to grant leave to the plaintiffs to file their appeal out of time.
7. In determining this application, I am cognisant of the parameters for consideration set by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat V The Independent Electoral & Boundaries Commission & 7 Others*, [2014] eKLR. The following guiding principles were established by the Court:
 - i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay;
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
 - viii. The degree of prejudice to the respondent if the application is granted
8. From the record before me, vide a ruling dated 24th November 2022, this Court (Okwany J) ordered the plaintiff to pay the defendants the sum of Ksh.121,780,651.06. The proceedings in the file indicate that the ruling was delivered in the presence of the advocates for both of the parties. The plaintiffs did not take any action after the delivery of the ruling including filing an appeal until almost 5 months later when they filed the instant application seeking leave to file an appeal out of time and stay of execution pending appeal.
9. The plaintiffs prayed for leave to file their appeal out of time on the basis that their director had been unwell for a while and could not issue instructions to the plaintiffs' advocates to file the appeal on time. The plaintiffs did not provide any evidence to prove this allegation.



10. While the plaintiffs aver that they have a meritorious appeal worthy of consideration, I note that the plaintiffs have not exhibited a draft Memorandum of Appeal to show the Court the grounds upon which the intended appeal is anchored. This would have enabled this Court to gauge whether the appeal raises real issues for determination and confirm that it is not frivolous.
11. The defendants have stated, and I agree with them, that having obtained a favourable decision on 24th November 2022 ordering the plaintiffs to pay a colossal sum of Ksh.121,780,651.06 which they have been unable to execute to date, has continued to cause the defendants undue prejudice.
12. I am reminded that extension of time is an equitable remedy that should only be available to deserving parties. I am not satisfied that any good reason has been cited to enable this Court indulge the plaintiffs. Having made the observations above, I find no justifiable and plausible reason to grant leave to the plaintiffs to file their appeal out of time.
13. Consequently, it is an exercise in futility for me to consider the second issue no appeal lies in the Court of Appeal.

Determination

14. The upshot of the forgoing is that the application before the court is devoid of merit and the same is dismissed with costs awarded to the 1st defendant.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 16TH DAY OF FEBRUARY 2024.

F. MUGAMBI

JUDGE

